FILE COPY

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1958

No. [redacted] 86

JESSE I. LINDER,
Appellant,

vs.

HOWARD B. COLLINS, LEONARD PILGER, and GEORGE L. BARTON, As Members of The Board of County Commissioners of Wallace County, Kansas; E. L. RIVERS, ED V. MORIN, GLEN HUFFMAN, GEORGE HARRISON and EARL TEED, As Members of The Board of Hospital Trustees of Wallace County, Kansas; C. E. SWANSON, As County Clerk of Wallace County, Kansas; BONNIE KNOUSE, As County Treasurer of Wallace County, Kansas; and JAMES W. BIBB, As the Budget Director of the State of Kansas,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS.

MOTION TO AFFIRM.

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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 1051.

JESSE I. LINDER,
Appellant,

vs.

HOWARD B. COLLINS, LEONARD PILGER, and GEORGE L. BARTON, As Members of The Board of County Commissioners of Wallace County, Kansas; E. L. RIVERS, ED V. MORIN, GLEN HUFFMAN, GEORGE HARRISON and EARL TEED, As Members of The Board of Hospital Trustees of Wallace County, Kansas; C. E. SWANSON, As County Clerk of Wallace County, Kansas; BONNIE KNOUSE, As County Treasurer of Wallace County, Kansas; and JAMES W. BIBB, As the Budget Director of the State of Kansas,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS.

MOTION TO AFFIRM.

The appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the judgment and decree of the District Court be affirmed on the grounds:

1. That the question is so unsubstantial as not to warrant further argument.
2. That neither the Court below nor this Court has jurisdiction as it is an action to enjoin the enforcement of a tax authorized by State statute, and the appellant has a plain, adequate, speedy and efficient remedy under the laws of the State of Kansas.
3. That there is not the jurisdictional amount of $3,000 involved.
4. That the case does not involve any civil rights protected by the Constitution of the United States or by any Act of Congress, but being at most a property right or an alleged vested right as distinguished from a personal individual right.

STATEMENT.

This is an action brought by Jesse I. Linder, the appellant, alleging jurisdiction under Title 28, U. S. C., Sec. 5, 1343, 2201, 2281 and 2284, and seeks to enjoin a tax levied under State law, for a declaratory judgment, and to have declared as unconstitutional an act of the Kansas Legislature, now appearing as G. S., 1957 Supp., 19-1848A, copy of which is set forth on page 3 of Appellant's Jurisdictional Statement, because it allegedly deprives him of rights, privileges and immunities guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

The appellant alleges violation of vested rights to have a hospital continued without any change in the laws. There are no allegations of any personal rights, but only property rights or vested rights are set forth or alleged. The action seeks to have injunctive relief to restrain and enjoin the appellees who are duly elected or appointed officers charged with administration of the act and providing funds for operation with public funds a county medical center,

and levying a one mill tax per $1,000.00 property valuation for such building and clinic or medical center for 1958, the tax being levied in 1957. The appellant and appellees are all residents and citizens of Wallace County, Kansas.

To enable this Court to understand better the contentions of the appellees a copy of appellees' Answer is set forth as Appendix "I". After a pre-trial Conference, the Appellees also filed a Motion to Dismiss as set forth in Appendix "II". The Judgment of the Court is set forth in appellant's Jurisdictional Statement as Appendix "A".

The pleadings and page six of the appellant's Jurisdictional statement admit that the building was used and operated after the enactment of the statute complained of for the purposes set forth in the act complained of.

There is no allegation or statement that appellant is being treated any different than any other citizen or resident, or that his liabilities are different from any one else. Appellant does not bring the action as a member of a class, but in his individual capacity only.

The appellant on page 4 of his Jurisdictional Statement admits "(3) * * * a particular part of the relief sought involves the levy or collection of a tax under state law, there being a plain, speedy, and efficient remedy in the state courts for such particular part of the relief sought."

ARGUMENT.

The litigation involves basically the question of whether or not a Federal Court should take jurisdiction to enjoin the enforcement of an act providing a hospital or medical clinic for a remote and sparsely populated Western Kansas county with a population of less than 2500, which has for its objective the promotion of the public welfare, public health

and public good, in which the tax involved amounts to only $2.20 on appellant's property; there is no diversity of citizenship; no civil rights are being violated; no allegation of any different treatment accorded the appellant than to any other citizen; in other words where the appellant is treated the same as all other residents of Wallace County, Kansas.

The Courts of the United States are Courts of limited Jurisdiction and a litigant must bring himself strictly within the terms thereof to be heard; that is to say he must show the Court has jurisdiction. Title 28, U.S.C., § 1331, reads:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

Under this statute two things must concur, the amount in controversy must exceed $3,000 and the question must arise under the Constitution, laws or Treaties of the United States.

It is well settled in tax cases that the amount in dispute or object of the suit is the amount in controversy (*Aero Design & Engineering* v. *Oklahoma Employment Security Commission*, 151 F. Supp. 844, W. D. Okla. 1956, 3 Judge Court, affirmed 353 U. S. 943). Here manifestly there is not the jurisdictional amount; appellant's tax amounts to only $2.20

The appellant first seeks to get away from the prohibition under the above statute by seeking to avail himself of Title 28, U. S. C., 2201:

> "In case of actual controversy within its jurisdiction except with respect to Federal taxes, any Court

> of the United States * * * upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought * * *."

This act is normally referred to as the Declaratory Judgment Act. Kansas has a Declaratory Judgment Act, G. S. 1949, 60-3127 *et seq.*, which can adequately and speedily determine the questions here involved, and which is appealable to the Kansas Supreme Court thence to the United States Supreme Court.

The appellant apparently has abandoned this theory of the case, and rightly so, as there is no diversity of citizenship and the requisite jurisdictional amount is not involved. The appellant does not discuss this in the jurisdictional statement, although setting forth as one of the grounds, this provision in his complaint. It is pointed out here to show that the appellant does have a full, complete, adequate and speedy remedy in the State Courts of Kansas to determine constitutionality of the State Statute involved.

The appellant cannot avail himself of the provisions of Title 28, U. S. C., 1332, because there is no diversity of citizenship and the requisite amount of more than $3,000 is not present.

The appellant is next confronted with the provisions of Title 28, U. S. C., 1341, reading:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any State tax where a plain, speedy, and efficient remedy may be had in the Courts of the State."

In the case of *George F. Alger Co. of Detroit, Mich., et al.* v. *Peck et al.*, (1954) U. S. D. C. S. D. Ohio, 119 F. Supp. 812, the Court dismissed an action to enjoin collection of a tax

because there was a plain, speedy, and efficient remedy in the Courts of the State of Ohio. The Supreme Court of the United States affirmed this decision in 347 U. S. 984. For a further discussion of the points involved see *Reiling* v. *Lacy*, U. S. D. C. Md., 93 F. Supp. 462, where essentially the same questions are involved as in this case, and at page 466 the Court states:

> "But the prayer for alternative relief is essentially a taxpayer's suit to protect the plaintiff from being required to pay alledgedly unlawful taxes and therefore, of course, relating only to his property and not to personal constitutional rights. Federal jurisdiction of a suit of this nature falls under subsection (1) (a) of section 41 of Title 28, which requires a showing that the amount in controversy exceeds $3,000.

The Court in *Reiling, supra*, found in accord with the contentions of the appellees in this case. The Reiling case was subsequently dismissed by the United States Supreme Court at 341 U. S. 901.

The Kansas statutes grant to the appellant several methods of procedure to protect his rights fully with a plain, speedy and efficient remedy. The taxpayer may pay his taxes under protest, and then appeal to the Board of Tax Appeals, for redress of grievance, thence to the District Court, thence to the Supreme Court of Kansas, thence to the United States Supreme Court, or he can file a direct action in the District Court for recovery of taxes paid under protest, and he has the same rights of appeal to the Supreme Court of the State of Kansas and to the United States Supreme Court as in other cases. The provisions of the Kansas Statutes as to payment of taxes under protest is shown in Appendix "III", 1949 G. S. 79-2005; and the rights of appeal are shown in Appendix "III", being G. S. 1957 Supp., 74-2426.

The appellant also has another right under the Kansas Statutes in that he is granted the right to file a direct action in the District Court to enjoin the enforcement of any attempt to collect a tax for the reasons he sets forth in his complaint. This statute is G. S. 1949, 60-1121, which is set forth in Appendix "III"; hence the appellant has still another remedy that gives him a plain, speedy and efficient remedy that can be appealed to the Kansas Supreme Court and thence to the United States Supreme Court.

Apparently admitting the accuracy of the above contentions, the appellant seeks to bring himself within the provisions of 28 U. S. C. 1343 (3):

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * * (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

The cases on which appellant relies sustaining the jurisdiction of the Supreme Court to review the judgment on direct appeal each involve individual constitutional rights, and therefore do not sustain appellant's position as in each case cited by the appellant there was an alleged deprivation of an individual constitutional right, which is absent in this case; the appellant complaining of divesture of a vested right, which is a property right not an individual right. We also call attention to what was said above in *Reiling* v. *Lacy, supra.*

In the Doud[1] and Morey[2] cases cited by the appellant

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[1]*Doud* v. *Hodge*, 350 U. S. 485.

[2]*Morey* v. *Doud*, 354 U. S. 457.

in his Jurisdictional Statement as to money order companies; in Brown[3] as to segregated schools; and in Valentine[4] as to chain stores, the equal protection clause of the Fourteenth Amendment was involved; in Hines[5] the Pennsylvania alien registration act encroached upon powers constitutionally vested in Congress.

There is absolutely no individual constitutional right, civil right, or other right justiciable in the federal courts which is asserted by the appellant. As was stated in *Hoffman* v. *O'Brien*, U. S. D. C. S. D. N. Y., 88 F. Supp. 490, affirmed in 339 U. S. 955, holding that a motion to dismiss must be sustained for the complaint fails to allege facts with sufficient definiteness to show that plaintiff has been deprived of rights, privileges, or immunities secured by the Constitution and by the Laws of the United States. "In short, it fails to allege an actual or justiciable controversy and therefore does not state a claim for declaratory relief."

The most that can be said for appellant's case is that he is alleging that he has a right to have a hospital under a state law as a "vested right" or that he is attempting to protect a property right, that is to avoid payment of a tax levied and assessed to maintain a hospital.

The appellant does not anywhere allege what civil rights are being violated; he does not allege or argue that a question of freedom of religion, discrimination because of color, race or creed is involved, or a deprivation of any right of free speech or of assembly, or any of those rights purely individual in nature or thought of when one thinks of the First Amendment or first section of the Bill of Rights, or covered in the Fourteenth Amendment.

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[3]*Brown* v. *Board of Education*, 347 U. S. 483.

[4]*Valentine* v. *Great A. & P. Tea Co.*, 299 U. S. 32.

[5]*Hines* v. *Davidowitz*, 312 U. S. 52.

As stated in *Kilgore* v. *McKethan*, U. S. C. A. 5th, 205 F. 2d, 425, Cert. Den. 346 U. S. 924, at 426. "We find nothing in the charges of the complaint which, if true, would constitute a violation of plaintiff's federally secured civil rights * * *. The Fourteenth Amendment does not have the effect of taking into federal control the protection of private rights against invasion of individuals."

In a suit involving licensing of photographers, *Connor* v. *Rivers*, D. C. N. D. Ga., 25 F. Supp. 937, the Court stated that there was no evidence or claim or allegation that the statute deprived the petitioner of "any right, privilege or immunity secured by the Constitution of the United States or of any right secured by any law of the United States Providing for equal rights of Citizens of the United States or of all persons within the jurisdiction of the United States, and therefore dismissed the petition. This action was affirmed 305 U. S. 576.

In *Hoffman* v. *O'Brien, supra*, involving wiretapping, the Court at 494 states, "The complaint here does not permit the exercise of discretion without a clear and unequivocal allegation that plaintiff's civil rights are being invaded by a court order obtained under the provisions challenged, plaintiffs have no standing to maintain this action. At page 493, "the complaint fails to allege any facts, showing real, present and actual personal injury to plaintiffs or distinguishing their situation from that of "people generally." Cites *Commonwealth of Massachussets* v. *Mellon*, 262 U. S. 447, 488, 43 S. Ct. 597, 67 L. Ed. 1078.

As stated in *Dinneen* v. *Williams*, U. S. C. A., 9 C. A., 219 F. 2d 428, there is no allegation at all upon which any claim for relief in the United States Court could be founded, at 430,

> "No conspiracy or joint action is claimed. There is no allegation of basis for contention or abridgement of his privileges and immunities as a citizen or a denial of due process or of equal protection of the laws. There even appears no suggestion of discrimination * * *. No deprivation by 'state action' is even hinted. While this enumeration of possible grounds may not be exclusive it highlights the fact that the pleading contains not a scintilla to support the legal conclusion of federal constitutional or statutory claim. But allegations of fact to found such a claim cognizable under some such category are essential to the jurisdiction of the District Court."

The Federal question must be real and substantial not colorable or frivolous. Mere references to the Federal Constitution, laws or treaties and mere assertions that a federal question is involved are not sufficient to confer jurisdiction, cited *McCartney* v. *State of West Virginia*, 4 Cir., 156 F. 2d 739, 741. See also *Cranney* v. *Trustees of Boston University*, U. S. D. C. Mass., 139 F. Supp. 130; *Reece* v. *Holm*, 31 F. Supp. 435, at 439.

Appellant's argument and allegations are based upon the matter of disturbance of an alleged vested right to have a definition or use of a public building continue unchanged. The act first establishing hospitals at public expense in Kansas was enacted in 1913 and now appears as amended in other particulars as G. S. 1949, 19-1801, and the act does not define hospital. The act which sets up a definition of a hospital as contended for by the appellant appears as G. S. 1949, 65-425, and was enacted in 1947. Prior to that time hospital had not been defined by statute in Kansas.

The purpose of the act questioned by the appellant was to make available to small communities medical facilities to promote the happiness, welfare, and health of a

community. The act was further a validating act of alleged wrongdoing, a purely legislative function. Can appellant argue that a validating act is void as being in violation of a civil right, or that it violates an alleged vested property right. Can it be said that the benefits of a hospital act cannot be extended so as to make available to small communities better health programs? Appellees emphatically say that doing such does not violate any claimed civil right of the appellant.

Appellant cites three cases in his Jurisdictional Statement as authority for this Court to review the decisions of the Court below: *Hague* v. *C. I. O.*, 307 U. S. 496, 507-514, 527-532; *Douglas* v. *Jeannette*, 319 U. S. 157, 161; and *American Federation of Labor* v. *Watson*, 327 U. S. 582, 590.

The Hague Case relates to a matter involving freedom of speech and assembly and the Court at page 531 states:

> "The conclusion seems inescapable that the right conferred by the Act of 1871 to maintain a suit in equity in the federal courts to protect the suitor against a deprivation of rights or immunities secured by the Constitution has been preserved, and that whenever the right or immunity is one of personal liberty, *not dependent for its existence upon the infringement of property rights* (emphasis supplied by appellees), there is jurisdiction * * * without proof that the amount in controversy exceeds $3,000 * * *"

which clearly indicates that if it is a matter of property right, a vested right, then the District Court does not have jurisdiction.

The Case of *Douglas* v. *Jeannette*, 319 U. S. 157, involved the right of freedom of religion in the distribution of pamphlets by Jehovah's Witnesses and the case was dismissed in the end for want of equity.

In *American Federation of Labor, supra,* the Court at page 593 states:

> "But even though a district court has authority to hear and decide the case on the merits, it should not invoke its powers unless those who seek its aid have a cause of action in equity. (Cites *Douglas* v. *Jeanette, supra.*) The power of a court of equity to act is a discretionary one. *Penn* v. *Williams,* 294 U. S. 176, at 185. Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only 'to prevent irreparable injury which is clear and imminent' * * * (*Douglas* v. *Jeannette, supra,* at 163, *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89; *Di Giovanni* v. *Camden Fire Ins. Assn.,* 296 U. S. 64.)"

and particularly in the American Federation Labor case the Court page 591 took jurisdiction not under 28 U. S. C. 1341, but under the clause which grants the federal district courts jurisdiction of all suits and proceedings arising under any law regulating commerce and expressly denied jurisdiction was taken under what was then § 24 (1) or § 24 (14). There is no statement in the present case that interstate Commerce is involved.

Stripped of all excess verbiage, the appellant is contesting the imposition of a tax alleging that the instant suit involves his vested rights to have a hospital as defined by a previous existing statute; there are no allegations and one cannot find any of a violation of appellant's individual civil rights. As stated in *Kilgore* v. *McKethan et al.,* U. S. C. A., 205 F. 2d 425, 426.

> "* * * The Fourteenth Amendment does not have the effect of taking into federal control the protection of private rights against invasion of individuals. *Snowden* v. *Hughes,* 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497. Whatever plaintiff's rights may be in the premises, they do not arise from the Constitution or laws of the United States * * *."

> "Even under the doctrine of *Bell* v. *Hood*, 327 U. S. 678, 66 S. Ct. 773, 90 L. Ed. 939, 13 A. L. R. 2d 383, the mere assertion by a plaintiff that he is entitled to a federal remedy does not satisfy federal jurisdictional requirements, when the facts alleged do not support the assertion. * * *"

The true issue in this case involves the right of county officials to tax property in Wallace County, Kansas, based upon the assessed value and payable by all parties owning property.

Section 1343 (3) relied upon by the appellant is in fact a re-enactment of the Civil Rights statutes enacted shortly after the close of the Civil War, and was intended more effectively to secure the individual civil rights granted by the 14th Amendment. It was intended to secure equal rights and equal protection of the laws. As stated in *Norris* v. *Mayor and Council of Baltimore*, 78 Fed. Supp. 451 (D. Md. 1948), at page 462:

> "* * * but the prayer for alternative relief is essentially a taxpayer's suit to protect the plaintiff from being required to pay allegedly unlawful taxes and therefore of course relating only to his property and not to a personal constitutional right. Federal jurisdiction of a suit of this nature falls under subsection (1) (a) of Section 41 of Title 28, which requires a showing that the amount in controversy exceeds $3,000 * * * but with respect to taxpayer's suits or where property interests are involved in such a case, there must be a showing of the requisite amount in controversy * * * (Citations not copied)."

Appellee contends that the Court is without jurisdiction under either 1331, or 1343 (3) because (1) it does not arise under the "Civil Rights" act in which a personal constitutional right is involved. Although it is a suit "civil" in nature it is not an action within the purview of

Section 1343 (3). The federal courts being courts of limited jurisdiction do not have the power to hear and determine controversies which involve property rights under $3,000 under either section 1331 or 1332.

There is no discrimination alleged by the appellant, and if there were, the appellant does not show he is being discriminated against any more than any one else. It is generally understood that where a case can be determined on the basis of State law, the federal question, if existent, will not be considered.

The Three-Judge District Court in its opinion shown as an appendix in appellant's Jurisdictional Statement shows that it denied jurisdiction and would not take jurisdiction and was careful not to bar the appellant from using his other remedies, if any, he had in any other court or proceeding.

CONCLUSION.

It is submitted that the judgment of the Court below should be affirmed for the reasons: (1) That the jurisdictional amount provided by Title 28, U. S. C., 1331 or 1332, is not present because a tax of $2.20 is all that is involved; (2) That this is an action which substantially seeks to enjoin the collection of a tax, which fact is admitted in the Jurisdictional Statement of appellant, and the Court cannot enjoin a State tax under Title 28, U. S. C., 1341; (3) That the appellant seeks to rest his case on the alleged interference with a vested property right and not on the violation of an individual personal civil right guaranteed under the Constitution of the United States; (4) That there is in fact no allegation of the violation of any substantial allegation or statement of fact which would support an allegation that there is a substantial question involved of a

violation of any right guaranteed by the Constitution of the United States; (5) That the appellant has an adequate remedy in the State Courts of Kansas which guarantee to him plain, speedy and efficient adjudication of his rights, including a determination of the unconstitutionality of any State statute, and this right includes an absolute right of appeal to the Kansas Supreme Court and a right of appeal to the Supreme Court of the United States if there is a question involving the Constitution of the United States.

We respectfully submit that the appellant has not shown a substantial question for the decision of the Supreme Court of the United States and that the decision and decree of the Three-Judge District Court is clearly correct, further review is not warranted, and the judgment should be affirmed.

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APPENDIX I.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JESSE I. LINDER,

Plaintiff,

vs.

HOWARD B. COLLINS, LEONARD PILGER and GEORGE L. BARTON As Members of the Board of County Commissioners of Wallace County, Kansas; E. L. Rivers, Ed V. Morin, Glen Huffman, George Harrison and Earl Teed as members of the Board of Hospital Trustees of Wallace County, Kansas; C. E. SWANSON, As County Clerk of Wallace County, Kansas; BONNIE KNOUSE, As County Treasurer of Wallace County, Kansas; and James W. Bibb As the Budget Director of the State of Kansas,

Defendants.

Civil Action
Case No.
T-1754

Answer.

Comes now Howard B. Collins, Leonard Pilger and George L. Barton, as members of the Board of County Commissioners of Wallace County, Kansas; Ed V. Morin, Glen Huffman, George Harrison, and Earl Teed as members of the Board of Hospital Trustees of Wallace County, Kansas; C. E. Swanson, as the County Clerk of Wallace County, Kansas, and Bonnie Knouse as County Treasurer of Wallace County, Kansas, being the defendants above named and described, and also Anton Damm, as one of trustees of the Board of Hospital Trustees of Wallace County, Kansas, and respectfully show to the Court the following facts, viz:

1. That heretofore and on or about the 21st day of May, 1957, E. L. Rivers a member of the Board of Trustees of the Wallace County Hospital, tendered his resignation, which resignation was accepted and Anton Damm was appointed as a member of the Board of Hospital Trustees of Wallace County, Kansas, and the said Anton Damm as such trustee waives the issuance and service of summons, and enters his appearance herein as such trustee to the same force and effect as if personally served with summons.

2. That Howard B. Collins, Leonard Pilger, George L. Barton are the duly elected, qualified and acting Board of County Commissioners of the County of Wallace, State of Kansas. That Ed V. Morin, Glen Huffman, George Harrison, Earl Teed and Anton Damm constitute the Board of Hospital Trustees of the County of Wallace, State of Kansas. That C. E. Swanson is the duly elected, qualified and acting County Clerk of Wallace County, Kansas, and *ex officio* County Assessor. That Bonnie Knouse is the duly elected, qualified and acting County Treasurer of Wallace County, Kansas.

3. That the plaintiff and the defendants are all citizens of the State of Kansas, and all are residents of Wallace County, Kansas.

4. That the defendants are informed and therefore state it to be a fact that the real estate described in the third paragraph of plaintiff's complaint is as set forth therein. That said real estate has a total assessed value for the year of 1957 of the sum of $4,400.00, and that the taxes are levied against said valuation. That the tax complained of by the plaintiff assessed against said property, being a hospital levy of one half mill (0.0005) will amount to the sum of two dollars and twenty cents ($2.20).

5. That the Board of County Commissioners of the County of Wallace, State of Kansas, within the time provided by law, published a budget as required by 1949 G. S. 79-2925 *et seq.*, and did give the notice of the time and place of a meeting for hearing protests to be filed or made by any taxpayer against said proposed budget and said tax levy, including the tax assessment complained of by the plaintiff, said notice being given in substantial compliance with G. S. 1949, 79-2929. That at the time and place providing for filing complaints and protests against said alleged hospital levy, no person, appeared. The plaintiff herein did not appear and make any protest or objection to said budget or any part thereof.

6. That the statutes of Kansas, and particularly G. S. 1949, 79-2005, sets forth a method for protesting the payment of any tax alleged to be illegal, unlawful, wrongful, erroneous, and provides for the impounding of any and all taxes paid under protest by the County Treasurer, who is required to place said protested taxes in a separate and distinct fund, and said statute provides that the aggrieved taxpayer, may then file his complaint or application for a refund with the State Commission of Revenue and Taxation, now the Board of Tax Appeals as created by L. 1957, Ch. 429, and which statute in section 6, subdivision (f), provides for the hearing and deciding all applications for refund of protested taxes under the above statute, and which L. 1957, Ch. 429, Sec. 12, further provides for a method of appeal to the Kansas Courts from the decision of the Board of Tax Appeals; and said G. S. 1949, 79-2005, gives to any aggrieved taxpayer the alternative right to commence an action in a Court of competent jurisdiction for the recovery of said taxes, and the Statutes of Kansas provide for appeal to the Supreme Court of Kansas in such events. That these provisions of the statutes gives

to the complainant or plaintiff in this action or to any other taxpayer who has a tax grievance a full, complete, speedy and adequate remedy at law, and provides for due process of law in every respect.

7. That the statutes of Kansas give to the plaintiff herein an opportunity to appear before said Board of Tax Appeals as above set forth, or to sue in a Court of competent jurisdiction, viz., a District Court or a County Court, within the State of Kansas and to appeal therefrom through regularly constituted channels to the Supreme Court of Kansas, and from thence, if dissatisfied under conditions set up by the statutes of the United States to the Supreme Court of the United States. That the plaintiff herein has not paid said taxes or any part thereof, either willingly or unwillingly under protest. That the plaintiff has not availed himself of the opportunity for a full, complete and adequate remedy provided by the laws of the State of Kansas before either an administrative tribunal or a court of competent jurisdiction provided by the laws of Kansas.

8. That the statutes of Kansas, G. S. 1949, §60-3127 provides in substances that in the case of an actual controversy, the courts of record of the State of Kansas have the power to make a binding adjudication of controversies involving the interpretation of * * * statutes, municipal ordinances and other governmental regulations and to make a determination, of such matters, and the enumeration does not exclude other instances of actual antagonistic assertion and denial of right, and sets up a procedure for the same and sets forth that it is intended to be remedial as more fully set forth in G. S. 1949, §60-3132. That this procedure affords the plaintiff herein full, adequate and proper procedure for the determination of the questions sought to be litigated in the United States District Court in this instance. That it was not intended that the United States District Court should be used under the provisions

of the Declaratory Judgment section of the United States Code, Title 28, U. S. C., §2201, and that to use such power is beyond the jurisdiction of said United States District Court.

9. That Title 28, U. S. C., §1331 provides that the districts courts shall have jurisdiction of all civil actions wherein the amount in controversy exceeds the sum or value of $3,000 *AND* arises under the Constitution, laws or Treaties of the United States. That the facts hereinbefore set forth discloses that the amount of tax in controversy does not amount to said amount in so far as the plaintiff is concerned.

10. That under the laws of the State of Kansas, the Board of County Commissioners of the County of Wallace, State of Kansas, is a subdivision of the State of Kansas and a municipal corporation; that it is charged with the levy of all taxes for general county wide levies and funds; that it is a part of the State of Kansas, and that it comes within the provision of Title 28, U. S. C., §1341 which provides that the District Court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the Courts of such State. That by virtue of the facts hereinbefore set forth, the plaintiff does have a plain, speedy and efficient remedy in the Courts of Kansas and before administrative tribunals to which he has not resorted. That under the decisions of the United States Courts this prohibition has been held to extend also to proceedings under Title 28, U. S. C., §2281.

11. The defendants further admit that the proposition set forth in the fifth paragraph of the plaintiff's petition was duly submitted to the voters of Wallace County, Kansas on the 26th April, 1949 and that the vote

thereon was for the adoption four hundred seventy two, and against the proposition one hundred four. That it had been fully explained to the voters of said county, and opportunity was given in open meetings for a frank and open discussion of what was intended to be done, and the type of building that was to be constructed and how it was proposed to be handled. That at all times mentioned in the petition or complaint of the plaintiff it was intended to promote the welfare of the citizens of Wallace County by providing an adequate and modern system of medical care and attention and to promote the general welfare and happiness of the citizens of Wallace County, Kansas. That the actions of the various parties who have served as county commissioners or as trustees for the hospital have endeavored to carry out the wishes of the citizens and to promote the general welfare, health and best interests of the citizens of Wallace County, Kansas. That none of the defendants have acted in an arbitrary, capricious or unlawful manner but all of their action has been *bona fide* in good faith.

12. That after the funds were raised by taxation, and against which no taxpayer ever lodged any protest or paid any tax under protest, and in the fall of 1951, the Board of Hospital Trustees of Wallace County, Kansas did cause to be drawn plans for a building for hospital and medical or clinical purposes, and did advertise for bids for its construction; that at the time of the opening of bids, the bids were excessive, and thereafter, the Board of Hospital Trustees did cause the plans to be altered and changed, and new bids were negotiated in accordance with the general custom prevailing on public work where funds are insufficient to pay the bids under plans and specifications theretofore existing. That the building now on the lots described in paragraph 11 of the plaintiff's complaint were purchased with funds arising from the tax levies set forth

therein. That thereafter the defendants did use funds arising from said tax levy for the purchase of equipment and supplies and fixtures for said building, all of which are proper and usable for any hospital, medical building, medical center, clinical building or other medical institution, and within the intent of the laws of the State of Kansas.

13. That thereafter, questions having been raised over the construction of the building the legislature of the State of Kansas, enacted G. S., 1955 Supp., 19-1848A, which statute was effective upon its publication in the official newspaper being published on March 31st, 1955, which said statute purports to validate all matters theretofore done. That the plaintiff does not point out any specific errors in the enactment of such statute, other than to allege that it seeks to make legal socialized medicine, which your answering defendants state is a matter for the legislature to determine, being a legislative function, and that the defendants allege and state that said act so passed is valid and wholly constitutional. That the plaintiff does not have any vested right as to the use of any building which may be constructed by money raised by taxation, and such statute does not violate the Constitution of the United States and particularly the Fourteenth Amendment to the United States Constitution, nor does it deprive the plaintiff of due process of law or of any of his constitutional rights.

14. That thereafter the defendants did enter into a contract or lease arrangement with one Dr. A. R. Cuadrado, M. D., which said lease was duly signed, and which appears in the Journal of Proceedings of the County Commissioners of Wallace County, Kansas, under date of Feb. 27, 1956, at page 189 of Vol. ..... and that said proceedings are public records of the same force and effect as any other

proceedings, and were available to the plaintiff or any other citizen as by law provided. That the said Dr. A. R. Cuadrado, M. D., used said premises and said equipment from said time of said lease until about the 1st day of May, 1957 or a period of more than one year, all of which facts, use and occupancy was well known to plaintiff.

15. That no attack has ever been made by any one in any Court of competent jurisdiction until the instant proceedings, and that said law shall be presumed to be fully constitutional, valid and binding until proper proceedings are brought to set the same aside and that the burden is upon the plaintiff to show that such is an unconstitutional statute.

16. That as to each and every of the other statements, averments and allegations of facts, conclusions of law, conclusions of fact, opinions and other matters not hereinbefore admitted, explained or modified, the defendants deny each and every of the same and asks that the plaintiff be placed upon strict proof of the same.

Wherefore, your appearing defendants respectfully ask the Court upon the facts, averments, statements, and allegations set forth in the Complaint and Answer, to determine, First: whether or not the Court has jurisdiction to try said action in view of the provisions of Title 28, U. S. C., § 1331, §1341, § 2201 and § 2281, and the decisions of the Court relating thereto; Second: to determine whether or not the Court has jurisdiction in view of the fact that the plaintiff is afforded a full, complete, plain, adequate and speedy remedy either before an administrative tribunal or State agency, or in a Court of competent jurisdiction established under the laws of Kansas, where the same relief may be granted as sought in the instant case, if plaintiff be entitled to such relief; Third: to determine whether or not the facts, allegations, statements, averments and con-

clusions set forth in the complaint are sufficient to show a cause of action in favor of the plaintiff and against the defendants; or fourth, in the alternative, to adjudge and decree that the acts of the defendants are wholly lawful, and proper, and serve to promote the happiness, welfare and health of the people of Wallace County, Kansas, and that such is being done pursuant to valid legislation, which was legally enacted and which conforms to the Constitution of the United States, and that the plaintiff take nothing by his complaint (petition) and that the defendants have their costs herein and such other and further relief as may be proper, just and equitable.

/s/ James E. Taylor,
County Attorney,
Wallace County,
Sharon Springs, Kansas,
Attorney for Defendants,
appearing as aforesaid.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS.

JESSE I. LINDER,
Plaintiff,
v.
HOWARD B. COLLINS et al.,
Defendants.

Case No. T 1754.

Certificate.

I, James E. Taylor, do hereby certify that after the filing of said above entitled answer in the above entitled cause and matter with the Clerk of the United States District Court for the District of Kansas in Topeka, Kansas, on the 22 day of November, 1957, I did thereafter, cause a copy of said Answer to be inserted in a letter or envelope, addressed to Jesse I. Linder, Attorney at Law, Sharon Springs, Kansas, the plaintiff in said action appearing *pro se*, and did affix the necessary first class postage thereto and did or will deposit the same in the United States Post office at Topeka, Kansas, on this 22 day of November, 1957.

I further state that the defendants consent to the designation for trial and other proceedings in said cause in the United States District Court for the District of Kansas sitting at Topeka, Kansas.

Witness my hand this 22 day of November, 1957.

/s/ James E. Taylor,
County Attorney,
Wallace County,
Sharon Springs, Kansas,
Attorney for answering Defendants.

APPENDIX II.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JESSE I. LINDER,
Plaintiff,
vs.
HOWARD B. COLLINS et al.,
Defendants.

Civil Action
Case No.
T-1754

Motion.

Come Now the defendants in the above entitled cause and respectfully move the Court to dismiss the above entitled matter for the following reasons, viz:

(1) That the above is an action to enjoin the collection of a tax levied under the laws of the State of Kansas, and the laws of the State of Kansas provide the plaintiff, as a taxpayer, a plain, full, complete, adequate and speedy remedy at law, either by paying his taxes under protest as provided by G. S. 79-2005, and then within thirty (30) days filing an action in a Court of competent jurisdiction of the State of Kansas, or within said thirty (30) days, file an application with the Board of Tax Appeals of the State of Kansas, as now constituted under G. S., 1957 Supp., 74-2439, with the right of appeal therefrom to the Courts of Kansas as provided by G. S., 1957 Supp., 74-2426, which gives him the right of appeal through the Courts of Kansas to the Supreme Court of Kansas, and thence to the Supreme Court of the United States, as by law provided, or in lieu of such tax protest method, the taxpayer is also authorized under G. S. 1949, 60-1121, to bring an injunction action in the State Courts of Kansas.

(2) That said action, being an action to enjoin a tax levied under the laws of Kansas, is in violation of the

United States Statutes, 28 U. S. C. 1341, providing in substance that the District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under the State law, where a plain, speedy and efficient remedy may be had in the Courts of such State; which such plaintiff has as shown above.

(3) That said action also seeks to procure a declaratory judgment of a Kansas Statute, under the Federal Declaratory Judgment Act, 28 U. S. C. 2201, when the plaintiff has a full, complete, adequate and speedy remedy as shown above as well as under the Declaratory Judgment Act of the State of Kansas, viz, G. S. 1949, 60-3132.

(4) That said action is a civil action and the complaint and other pleadings show clearly that there is no substantial federal question involved, nor is there a diversity of citizenship, and the amount involved is less than $5.00.

Respectfully submitted,
/s/ James E. Taylor,
Sharon Springs, Kansas,
Morris, Laing, Evans & Brock,
By /s/ Verne M. Laing,
413 Brown Building,
Wichita 2, Kansas,
Attorneys for Defendants.

ACKNOWLEDGMENT OF SERVICE.

A copy of the foregoing Motion was served personally this 5th day of February, 1958, upon us by attorneys of record for the defendants.

/s/ Jesse I. Linder,
/s/ W. A. Kahrs.

APPENDIX III.

General Statutes of Kansas, 1949.

79-2005. *Protesting payment of taxes; form and contents of protests; proceedings for recovery of protested taxes, limitations.*

(1) Any taxpayer before protesting the payment of his taxes, shall be required, at the time of paying said taxes, to make and file a written statement with the county treasurer clearly stating the grounds on which the whole or any part of said taxes are protested, and shall further cite any law, statute, or facts on which such taxpayer relies in protesting the whole or any part of such taxes and mail a copy of such protest to the governing body of the municipality making the levy being protested, and: (a) If the grounds of such protest shall be that any tax levy or any part thereof is illegal, shall further state the exact portion of said taxes which is being protested; or (b) if the grounds of such protest shall be that the valuation or assessment of the property upon which the taxes so protested are levied is illegal or void, shall further state the amount of valuation or assessment which the taxpayer admits to be valid and the exact portion of said taxes which is being protested. The county treasurer shall disburse to the proper funds all portions of taxes not so protested and he shall impound in a separate fund all portions of such taxes which are so protested. (2) Every taxpayer protesting the payment of taxes, within thirty days after filing his protest shall either commence an action of the recovery thereof in some court of competent jurisdiction, or, file an application with the state commission of revenue and taxation for a hearing on the validity of such protest. Within ten days after the filing of such application, such taxpayer shall give notice of the same to the county treasurer by fil-

ing with him a true copy of the application filed with the commission. The commission shall fix a time and place for a hearing on such application and shall notify such taxpayer, the county treasurer, and the clerk, secretary, or presiding officer of the governing body of any taxing unit affected by such protest of the time and place so fixed. The time fixed for such hearing shall be not later than sixty days after the filing of the application. At the time and place fixed for the hearing, the commission shall hear such application and, when it determines such protest, shall enter its order thereon and give notice of the same to the taxpayer, the county treasurer, and the clerk, secretary, or presiding officer of the governing body of the taxing unit affected by the protest by mailing to each a copy of its order. Such order shall be made within ninety days after the completion of said hearing. If any taxpayer so protesting his taxes shall fail: (a) To file such application with the commission within the time hereinbefore prescribed and to give the county treasurer notice of the filing of such application with the commission within the time hereinbefore prescribed; or (b) to commence an action in some court of competent jurisdiction for the recovery of the taxes protested within the time herein prescribed; such protest shall become null and void and of no effect whatsoever and upon any such failure the county treasurer shall disburse to the proper funds all portions of such taxes protested. No action shall be brought or maintainable in any court for the recovery of any taxes paid under protest unless the same is commenced within thirty days after the filing of such protest with the county treasurer, or, in case application shall have been filed with the commission as hereinbefore set out, unless the same is commenced within thirty days after the date the commission mailed its order on such protest to such taxpayer. In the event no such action is commenced within such thirty-day period,

the county treasurer shall, as soon thereafter as reasonably practicable, cause said impounded tax money to be refunded to the taxpayer or distributed to the fund or taxing district properly entitled to receive the same, in accordance with the order of the commission issued thereon.

1957 Supplement to General Statutes of Kansas, 1949.

74-2426. *Board of tax appeals; final orders; copies to parties to appeals; appeals to district court; venue; bond; notice of appeal; equity proceeding; referees; evidence; appeals to supereme court; unreasonable, arbitrary or capricious rules or regulations not enforced.*

Whenever the board of tax appeals shall enter its final order on any appeal, said board shall mail a copy of its order by registered or certified mail to the person, firm, corporation or association who was a party to such appeal. Within thirty (30) days after the mailing of the final order of the board, any party to such appeal may appeal to the district court of the proper county. Appeals from orders made under the taxation of legacies and successions act shall be to the district court of the county where the estate is being administered, but if the estate is not being administered in Kansas, the appeal shall be (1) to the district court of any county where real estate belonging to the estate is located, or if it owns no real estate, then to the district court of Shawnee county if the party appealing is a nonresident, or to the district court of the county where the party appealing resides if the party appealing is a resident of the state of Kansas. Appeals from orders made under any excise tax act shall be to the district court of the county in which the party appealing resides, or has his principal place of business, or if a nonresident of the state of Kansas, to the district court of the county where

he maintains his principal place of business in the state, or if he has no place of business within the state, then to the district court of Shawnee county. Appeals from any final order made by the board as to *ad valorem* tax liability shall be to the district court of the county in which the property involved is located, or if located in more than one county, then to the district court of any county in which any portion of the property is located. At the time of filing the appeal, the party appealing under any excise tax act, shall give a bond for costs in the sum of twenty-five dollars ($25) conditioned that he shall prosecute the appeal without delay and pay all costs assessed against him, and, in the event that the appeal is from an order determining the amount of tax assessable and the tax has not been paid, an additional bond in an amount equal to twice the amount of the tax assessed. The appeal shall be taken by filing, with the clerk of the district court of the proper county, a written notice stating that the party appeals to the district court and alleging the pertinent facts upon which such appeal is grounded. Upon filing of the notice of appeal, the director shall be deemed to be a party to such appeal, and the clerk of the district court shall docket the cause as a civil action, and shall forthwith and without praecipe issue summons and cause the same to be served upon the director, in accordance with the manner now provided by law in civil cases. Jurisdiction to hear and determine such appeals is hereby conferred upon the district courts of this state. Such an appeal shall be heard as an equity proceeding, and shall proceed as an original action. Trial may be had or any order made in term or vacation. The district courts are empowered to appoint referees, either standing or special, to hear the evidence and recommend findings of fact and conclusions of law. The transcript of the proceedings had at the hearing before the board of tax appeals may be admissible in evidence.

Appeals may be taken from the district to the supreme court by the party appealing or by the director as in civil cases, except that the director shall not be required to give bond on appeal. The final decision made in such appeal shall be entered as a judgment as in other civil cases against the party appealing or against the director, as the case may be. In hearing and considering any such appeal, the court shall not enforce or give effect to any rule or regulation which it shall find to be unreasonable, arbitrary or capricious.

General Statutes of Kansas, 1949.

60-1121. *Illegal tax, charge or assessment; unauthorized contracts of public officer or board; common-nuisance action by state, petition to be verified.*

An injunction may be granted to enjoin the illegal levy of any tax, charge, or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same, or to enjoin any public officer, board or body from entering into any contract or doing any act not authorized by law that may result in the creation of any public burden or the levy of any illegal tax, charge or assessment; and any number of persons whose property is or may be affected by a tax or assessment so levied, or whose burdens as taxpayers may be increased by the threatened unauthorized contract or act, may unite in the petition filed to obtain such injunction: *Provided*, That when the act complained of in effect concerns or pertains to the making, erection, construction or repair of any public improvement, the trial judge or reviewing court, in case of appeal, shall upon the issues joined therein, or the perfecting of the appeal forthwith assign said cause for trial or review, as the case may be, and the hearing thereof shall have precedence over all other cases, civil or criminal:

Provided further, That an injunction may be granted in the name of the state to enjoin and suppress the keeping and maintaining of a common nuisance. The petition therefor shall be verified by the county attorney of the proper county, or by the attorney general, upon information and belief, and no bonds shall be required.